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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 MALCOLM GRAY,

8 Plaintiff,

9 v.

10 DWIGHT NEVEN, *et al.*,

11 Defendants.  
12

Case No. 2:16-cv-01651-RFB-GWF

**ORDER**

13 **I. INTRODUCTION**

14 Before the Court is Defendants' Motion for Summary Judgment. ECF No. 28. Plaintiff  
15 alleges a First Amendment mail claim against Defendants Neven, Stroud, Filson, Nash, and  
16 Owens; a First Amendment retaliation claim against Defendant Childers, Foster, Neven, and Nash;  
17 and an Eighth Amendment conditions of confinement claim against Defendants Neven, Filson,  
18 and Nash. ECF No. 8. For the reasons below, the Court grants Defendants' motion and dismisses  
19 all claims.  
20

21 **II. FACTUAL BACKGROUND**

22 **A. Undisputed Facts**

23 The Court finds the following facts to be undisputed. Plaintiff Malcolm Gray is currently  
24 incarcerated at Southern Desert Correctional Center under the custody of Nevada Department of  
25 Corrections ("NDOC"). Plaintiff was formerly incarcerated at High Desert State Prison ("HDSF")  
26 during the relevant events, which occurred in 2014 and 2015.

27 a. Mail

28 Under NDOC Operations Procedure 750, unit correctional officers are responsible for

1 delivering mail to inmates Monday through Friday, between 7:00 PM and 10:00 PM. During June  
2 2015, Plaintiff was housed in unit 10 at HDSP. On Sunday, June 28, 2015, prison officials passed  
3 out mail in unit 10. On this date, Plaintiff received mail that was delayed by at least 48 hours.

4 The NDOC provides a means for prisoners to receive letters via electronic mail to a  
5 portable MP3 player. The mailroom reviews letters, and approved letters are printed and sent to  
6 the inmate's unit.

7 b. Dry Cell

8 HDSP Operations Procedure 428 allows for an inmate to be placed in a "dry cell" when  
9 that inmate is suspected of orally concealing contraband or any controlled substance. Inmates  
10 subject to a dry cell are strip-searched down to their underwear and may be placed in the dry cell  
11 up to 72 hours absent authorization from the Warden.

12 On October 13, 2014, Plaintiff was placed in a dry cell after engaging in a prolonged kiss  
13 with a visitor. Plaintiff remained in the dry cell for three days (72 hours) in only his underwear.  
14 No contraband was found on Plaintiff during his stay. Plaintiff's stay in the dry cell ended on the  
15 same day that he had a parole board hearing.

16 **B. Disputed Facts**

17 a. Mail

18 The parties dispute whether Plaintiff's mail was held in retaliation for filing grievances on  
19 four separate occasions in May 2014, June 2015, September 2015, and October 2015.

20 b. Retaliatory Statement

21 The parties dispute whether Defendant Childers told Plaintiff that if he kept filing  
22 grievances, Childers was going to write him up and "level reduce" him, which would mean placing  
23 Plaintiff in more restrictive housing conditions. They also dispute whether Childers would have  
24 had the authority to "level reduce" Plaintiff.

25 c. Dry Cell

26 The parties dispute whether Plaintiff's dry cell stay was in retaliation for filing grievances  
27 and lawsuits against the NDOC. Defendants allege that they placed Plaintiff in a dry cell because  
28 he received a suspicious kiss from a visitor. Defendants allege that a correctional officer witnessed

1 a visitor receive a small object from another visitor which she put in her mouth and then later  
2 witnessed her share a 30 to 45 second kiss with Plaintiff. Plaintiff alleges this a pretextual, falsified  
3 reason and that his placement in a dry cell was strategically designed to occur right before his  
4 parole board hearing so he would appear dressed in a segregation outfit, ragged, and unruly.

5 The parties further dispute whether Plaintiff was deprived of his clothing throughout his  
6 time in the dry cell in “frigid” conditions, whether prison officials permitted urine to remain in an  
7 open container in the corner of the cell and only emptied the container once a day, and whether  
8 prison officials did not permit him to wash his hands for those three days.

9 The parties also dispute whether Plaintiff administratively exhausted this Eighth  
10 Amendment claim.

### 11 12 **III. PROCEDURAL BACKGROUND**

13 Plaintiff submitted the Complaint on July 13, 2016. ECF No. 1-2.

14 The Court screened the Complaint on April 28, 2017, retaining the instant claims and  
15 dismissing others without prejudice. ECF No. 7. The Court filed the Complaint at ECF No. 8 and  
16 gave Plaintiff 30 days to file an amended complaint. Id. Plaintiff did not file an amended  
17 complaint. The Court filed an Order on June 6, 2017 reiterating its earlier screening order. ECF  
18 No. 10.

19 Defendants filed an Answer on November 2, 2017. ECF No. 21. On December 27, 2017,  
20 the Court set a discovery schedule. ECF No. 24. Discovery closed on March 21, 2018.

21 Defendants filed the instant Motion for Summary Judgment on April 20, 2018. ECF No.  
22 28. Plaintiff responded and Defendants replied. ECF Nos. 30, 31.

23 The Court held a hearing to address this motion on January 3, 2019. ECF No. 35. The  
24 Court ordered Defendants to provide a copy of the records related to the dry cell designation and  
25 placement. Id. Defendants complied on January 17, 2019. ECF Nos. 37, 38. The Court heard  
26 additional argument on February 1, 2019. ECF No. 40.

1           **IV.     LEGAL STANDARD**

2                   **a.   Summary Judgment**

3           Summary judgment is appropriate when the pleadings, depositions, answers to  
4   interrogatories, and admissions on file, together with the affidavits, show “that there is no genuine  
5   dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
6   Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering the  
7   propriety of summary judgment, the court views all facts and draws all inferences in the light most  
8   favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.  
9   2014). If the movant has carried its burden, the non-moving party “must do more than simply  
10   show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as  
11   a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine  
12   issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (citation and internal quotation marks  
13   omitted) (alteration in original).

14                   **b.   Administrative Exhaustion**

15           The Prison Litigation Reform Act requires that before bringing a § 1983 action, a prisoner  
16   must exhaust all available administrative remedies. 42 U.S.C. § 1997(e)(a). Exhaustion must be  
17   proper, meaning that the prisoner must proceed through each step of the prison’s grievance  
18   procedure. Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (citing Woodford v. Ngo, 548  
19   U.S. 81, 93 (2006)). Once the Defendants have carried their burden of showing the Plaintiff failed  
20   to exhaust each step of the grievance process, the onus falls on the Plaintiff to present evidence  
21   that the remedies ordinarily available to him were not available in his case. Albino v. Baca, 747  
22   F.3d 1162, 1172 (9th Cir. 2014).

23                   **c.   Qualified Immunity**

24           “The doctrine of qualified immunity protects government officials from liability for civil  
25   damages insofar as their conduct does not violate clearly established statutory or constitutional  
26   rights of which a reasonable person would have known.” Pearson v. Callahan, 555 U.S. 223, 231  
27   (2009). Qualified immunity is an immunity from suit rather than a defense to liability, and  
28   “ensures that officers are on notice their conduct is unlawful before being subjected to

1 suit.” Tarabochia v. Adkins, 766 F.3d 1115, 1121 (9th Cir. 2014). In deciding whether officers  
2 are entitled to qualified immunity, courts consider, taking the facts in the light most favorable to  
3 the nonmoving party, whether (1) the facts show that the officer's conduct violated a constitutional  
4 right, and (2) if so, whether that right was clearly established at the time. Id. Under the second  
5 prong, courts “consider whether a reasonable officer would have had fair notice that the action was  
6 unlawful.” Id. at 1125 (internal quotation marks omitted). While a case directly on point is not  
7 required in order for a right to be clearly established, “existing precedent must have placed the  
8 statutory or constitutional question beyond debate.” Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083  
9 (2011). This ensures that the law has given officials “fair warning that their conduct is  
10 unconstitutional.” Ellins v. City of Sierra Madre, 710 F.3d 1049, 1064 (9th Cir. 2013) (internal  
11 citation omitted).

12 In deciding a claim of qualified immunity where a genuine issue of material fact exists, the  
13 court accepts the version asserted by the non-moving party. Ellins v. City of Sierra Madre, 710  
14 F.3d 1049, 1064 (9th Cir. 2013). Summary judgment must be denied where a genuine issue of  
15 material fact exists that prevents a finding of qualified immunity. Sandoval v. Las Vegas  
16 Metropolitan Police Dept., 756 F.3d 1154, 1160 (9th Cir. 2014).

## 18 **V. DISCUSSION**

### 19 **a. First Amendment Mail Claim**

20 Generally, prisoners have a First Amendment right to send and receive mail. Witherow v.  
21 Paff, 52 F.3d 264 (9th Cir. 1995). But “a prison may adopt regulations which impinge on an  
22 inmate’s constitutional rights if those regulations are ‘reasonably related to legitimate penological  
23 interests.’” Id. (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). “Legitimate penological  
24 interests include security, order, and rehabilitation.” Id.

25 Defendants argue that a temporary delay in mail delivery necessarily does not violate a  
26 prisoner’s First Amendment rights, citing Crofton v. Roe, 170 F.3d 957 (9th Cir. 1999). In  
27 Crofton, the Ninth Circuit upheld the district court’s finding that a policy of diverting publications  
28 through the property room, which temporarily delayed the delivery of the plaintiff’s mail, was

1 “reasonably related to the prison’s interest in inspecting mail for contraband.” Id. at 961. Here,  
2 however, Plaintiff alleges that Defendants held Plaintiff’s mail as a retaliatory action and not for  
3 any reasonable penological purpose. Crofton therefore does not apply to bar Plaintiff’s claim on  
4 its face. Defendants’ argument that Crofton stands for the principle that any temporary delay in  
5 mail distribution cannot constitute a colorable First Amendment claim as a matter of law is  
6 incorrect.

7 Defendants argue that Plaintiff’s claim based on the alleged May 2014 incident is barred  
8 by the statute of limitations. The applicable statute of limitations is two years. McIntyre v. Chief  
9 of Police, Reno, 373 P.3d 941, 941 (Nev. 2011) (unpublished). Plaintiff completed the grievance  
10 process as to the May 2014 incident by August 2014. ECF No. 29, Exhibit H, page 115. The  
11 filing of the instant complaint on April 28, 2017 was more than two years later. Therefore, the  
12 First Amendment claim with regard to the alleged May 2014 incident is barred by the applicable  
13 two-year statute of limitations.

14 Defendants argue that Plaintiff has failed to present any evidence that the alleged  
15 September 18, 2015 letter from Tina Fox existed. Plaintiff provides a letter from Tina Fox dated  
16 February 2, 2017, in which Fox writes: “I have money to send these emails to be printed and it  
17 shows that they were sent. I’m tired of these people playing with our lives. I am not hurting them  
18 but they keep hurting me and I am not even an inmate.” ECF No. 30, Exhibit 2, page 12. Though  
19 the letter was written over a year after the alleged incident, when drawing all facts and inferences  
20 in light of Plaintiff, this evidence is sufficient to raise a genuine dispute of material fact as to  
21 whether Defendants have withheld Tina Fox’s mail from Plaintiff in the past. Plaintiff reasonably  
22 cannot produce the letter if his allegation that it exists but was never delivered to him is true.

23 Defendants argue that Plaintiff cannot show that any of the named individuals oversaw  
24 policies and procedures that allowed Plaintiff’s mail to be stashed, destroyed, or lost. Defendants  
25 argue that they are named in the complaint solely based on their status as supervisors. Because  
26 vicarious liability is inapplicable to § 1983 suits, Plaintiff must show individual liability for each  
27 named Defendant. Peralta v. Dillard, 744 F.3d 1076, 1085 (9th Cir. 2014). Plaintiff lacks any  
28 evidence of any specific Defendant: (a) fraudulently altering the received stamp date regarding the

1 June 2015 incident; (b) withholding a letter from Tina Fox dated September 18, 2015; or (c) failing  
2 to print and deliver letters on October 20, 2015. Plaintiff has not shown a genuine issue as to  
3 whether the individual Defendants' conduct caused the three alleged mail incidents that are not  
4 barred by the statute of limitations. Therefore, the First Amendment mail claim is dismissed as to  
5 all Defendants.

6 **b. First Amendment Retaliation Claim**

7 In the prison context, a claim for First Amendment retaliation under § 1983 must establish  
8 five elements: "(1) an assertion that a state actor took some adverse action against an inmate (2)  
9 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's  
10 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate  
11 correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005). Adverse action  
12 taken against a prisoner "need not be an independent constitutional violation. The mere *threat* of  
13 harm can be an adverse action." Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (internal  
14 citations omitted). The filing of grievances is a protected activity. Rhodes, 408 F.3d at 567–68.

15 The Court may consider the timing of an allegedly retaliatory action as circumstantial  
16 evidence of retaliatory intent, particularly where a punishment comes soon after an inmate plaintiff  
17 airs a grievance. Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003) (citing Pratt v. Rowland, 65  
18 F.3d 802, 808 (9th Cir. 1995)). However, "mere speculation that defendants acted out of retaliation  
19 is not sufficient." Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014). Decisions that are  
20 "retaliatory and . . . arbitrary and capricious" are "not a reasonable exercise of prison authority and  
21 [do] not serve any legitimate correctional goal." Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir.  
22 1985).

23 i. Claim Against Defendant Childers

24 Defendants argue that Plaintiff fails to allege specifically which of his grievances resulted  
25 in Childers's statement. Plaintiff need not make such a showing. Plaintiff's theory is that  
26 Childers's retaliatory motive was based on the frequency of his grievances rather than any specific  
27 one. This theory is consistent with the alleged statement itself, in which Defendant Childers said

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1 that if Plaintiff filed any more grievances, Childers would level reduce him. Moreover, the record  
2 supports that Plaintiff frequently filed grievances. See ECF No. 29, Exhibits H & I.

3 The fatal problem with Plaintiff's First Amendment claim against Childers is that Plaintiff  
4 fails to provide any detailed evidence to support his conclusory claim that the statement was made.  
5 Plaintiff provides only his affidavit stating that Defendant Childers retaliated "with a threat of level  
6 reduction for filing grievances." ECF No. 1-2 at 18. But "a conclusory, self-serving affidavit,  
7 lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of  
8 material fact." United States v. \$133,420.00 in U.S. Currency, 672 F.3d 629, 638 (9th Cir. 2012)  
9 (quoting FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997)). Plaintiff's  
10 allegation is one sentence in his submission. He provides no details of the conversation, including  
11 for example context or date of the alleged statement. This bare general allegation without more is  
12 insufficient to create a genuine issue of disputed fact on this claim.

13 ii. Claim Against Defendants Foster, Neven, and Nash

14 Defendants argue that Plaintiff was placed in a dry cell not as an act of retaliation, but  
15 rather to reasonably advance the legitimate correctional goal of preventing contraband based on a  
16 witnessed prolonged kiss between Plaintiff and a visitor that day. Under seal, in response to the  
17 Court's order, Defendants provide an Investigation Detail Report prepared contemporaneously  
18 with the incident which describes Defendants' rationale for confining Plaintiff to the dry cell.  
19 However, the Court need not and does not rely upon this document itself as Plaintiff does not  
20 dispute that a prolonged kiss occurred between himself and a visitor – a kiss that could give rise  
21 to suspension. Plaintiff provides no evidence other than his conclusory affidavit to rebut this  
22 undisputed fact. Absent any evidence from Plaintiff other than a conclusory affidavit, the Court  
23 finds that a Plaintiff has not created a genuine issue of disputed fact that he was placed in the dry  
24 cell as an act of retaliation. Again, Plaintiff has asserted a general and conclusory allegation as to  
25 Defendants' motive without any other evidence to support this self-serving allegation. Such a bare  
26 allegation, especially as to another's motive, without more cannot create a genuine issue of  
27 disputed fact otherwise such claims would routinely have to be resolved at trial based upon a

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1 simple allegation. Therefore, the First Amendment retaliation claim is dismissed as to Defendants  
2 Foster, Neven, and Nash.

3 The Court notes that the report was submitted under seal absent the permission required by  
4 Local Rule IA 10-5. In order to seal a record supporting a motion for summary judgment,  
5 Defendants must articulate compelling reasons supported by specific factual findings. Kamakana  
6 v. City & Cty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). At the hearing on February 1,  
7 2019, the Court heard argument regarding the sealed status of this record. Defendants did not  
8 articulate any security risk in allowing Plaintiff to review this record, nor any reason to maintain  
9 the record's seal other than their general prison policy of making such records unavailable to  
10 inmates. The details provided in the report are largely contained in Defendants' briefing, and  
11 Defendants have not identified any specific portion of the record that requires confidentiality. The  
12 Court finds a lack of compelling reasons to prevent disclosure of the record and orders the  
13 unsealing of the report.

14 **c. Eighth Amendment Conditions of Confinement Claim**

15 The Eighth Amendment's prohibition against cruel and unusual punishment protects  
16 prisoners not only from inhumane methods of punishment but also from inhumane conditions of  
17 confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). "A prisoner claiming  
18 an Eighth Amendment violation [for conditions of confinement] must show (1) that the  
19 deprivation he suffered was objectively, sufficiently serious; and (2) that prison officials were  
20 deliberately indifferent to his safety in allowing the deprivation to take place." Id. (internal  
21 quotation marks omitted).

22 "Although the routine discomfort inherent in the prison setting is inadequate to satisfy the  
23 objective prong of an Eighth Amendment inquiry, those deprivations denying the minimal  
24 civilized measure of life's necessities are sufficiently grave to form the basis of  
25 an Eighth Amendment violation." Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000). "Prison  
26 officials have a duty to ensure that prisoners are provided adequate shelter, food,  
27 clothing, sanitation, medical care, and personal safety," and the "circumstances, nature, and

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1 duration of a deprivation of these necessities must be considered in determining whether a  
2 constitutional violation has occurred.” Id.

3 Defendants argue that prison officials are entitled to qualified immunity for procedures  
4 undertaken for penological purposes when it comes to dry cell placement. The Court finds that  
5 the Defendants are entitled to qualified immunity. While these conditions may not represent ideal  
6 custodial conditions, there is no clearly established law that forbids the overall dry cell conditions  
7 alleged by Plaintiff under the Eighth Amendment. See Chappell v. Mandeville, 706 F.3d 1052,  
8 1061 (9th Cir. 2013).

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10 **IV. CONCLUSION**

11 **IT IS ORDERED** that Defendants’ Motion for Summary Judgment is GRANTED.

12 **IT IS FURTHER ORDERED** that the sealed filing at ECF No. 37 be UNSEALED.

13 **IT IS FURTHER ORDERED** that the Clerk of Court is instructed to close this case.

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15 DATED: February 19, 2019.

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18 **RICHARD F. BOULWARE, II**  
19 **UNITED STATES DISTRICT JUDGE**  
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